In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1105

IRVING A. BERK, d/b/a Berk Trade School,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims (Pet. App. 7) is reported at 185 Ct. Cl. 793.

JURISDICTION

The order of the Court of Claims was entered on October 4, 1968. On January 7, 1969, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including March

3, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims properly dismissed petitioner's claim on the ground that it had already been satisfied by a judgment of another court.

STATEMENT

Petitioner and the Veterans Administration entered into a number of contracts covering the period between 1948 and 1960 pursuant to which petitioner agreed to provide certain instruction and supplies incident to the vocational training of veterans. On March 9, 1962, the General Accounting Office sent petitioner a certificate of indebtedness with regard to these contracts. It stated that the government held some $72,000 owed to petitioner under the contracts, but also asserted that, due to use of incorrect cost data and billing for hours in excess of actual attendance, petitioner had been overpaid by about $94,000. It therefore requested petitioner to repay to the government some $22,000.

When petitioner failed to repay this amount, suit was brought by the United States in the United States District Court for the Eastern District of New York on August 26, 1963. Petitioner filed a counterclaim for the $72,000 allegedly due him. While the district court action was still pending, petitioner, on March 12, 1968, brought the instant action in the Court of

Claims to recover the same $72,000 asserted as a counterclaim in the other proceeding.

On April 18, 1968, the government moved for summary judgment in the Court of Claims action on the ground that the suit was barred by the statute of limitations. Petitioner, on June 13, filed his response to this motion. On July 19, in an extensive opinion, the Eastern District of New York held that the government was entitled to recover the $94,000 overpayment less the $72,000 withheld, or $22,000, from petitioner.[1] Consequently, on July 29, the government filed a reply brief in the Court of Claims action. This brief set out the district court's decision and asserted that, as a result, the Court of Claims action was barred since petitioner had already been credited with the $72,000 allegedly due from the government under the contracts. It noted that the government would have no objection if petitioner wished to file further papers in response to this new assertion.

At some unspecified time during the next two months, petitioner alleges that he submitted such a response to the Court of Claims, but that it was rejected by the court (Pet. 3).[2] In any event, on October 4, 1968, the Court of Claims issued an order granting the government's motion for summary judgment and dismissing petitioner's suit on the ground that "plaintiff's claim has already been satisfied as a

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[1] That opinion, rendered in *United States* v. *Irving A. Berk d/b/a Berk Trade School*, No. 63-C-960 (E.D.N.Y.), is not yet reported.

[2] We are informed by the Clerk of the Court of Claims that that court has no record of such a submission.

result of the judgment of the United States District Court for the Eastern District of New York * * *" (Pet. App. 7).

ARGUMENT

Petitioner's basic contention is that since the district court judgment in favor of the government is presently on appeal, it should not have been given *res judicata* effect by the Court of Claims (Pet. 5-6). He cites no authority for this proposition, and the established rule is precisely the contrary. *E.g.*, *Huron Corp.* v. *Lincoln Co.*, 312 U.S. 183, 188-189. Acceptance of petitioner's view would allow multiple proceedings to race each other toward finality, with attendant confusion and a substantial possibility for unfairness to the successful litigant in the court with the slower appellate review procedures (see generally 1B Moore, *Federal Practice*, ¶¶ 4.416 [3], [4], pp. 2251-2283). Should the Second Circuit reverse the decision of the district court, petitioner may then move to reopen the Court of Claims judgment under Rule 69(b)(5) of that court, which expressly allows relief from a judgment on the ground that "a prior judgment upon which it is based has been reversed * * *."[3]

Petitioner also contends (Pet. 4) that the government should not have been allowed to raise a new

[3] Of course, if the Second Circuit affirms the district court's decision and certiorari is not sought or is denied, petitioner will be barred from any recovery on these contracts—he does not dispute that the judgment of the district court gave him full credit for the $72,000 withheld by the government.

ground in support of its motion for summary judgment in its reply brief of July 29, 1968. However, he points to no provision in the court's rules requiring a party to file a separate motion for summary judgment upon learning of a new ground supporting its original motion. He does not allege that he filed a motion for leave to file a supplemental brief, and the Court of Claims docket entries do not reflect the filing of any such motion. Nor did he file a motion for rehearing under Court of Claims Rule 68. In any event, petitioner has not stated any legal ground of which he could have informed the court below that would have supported an opposite holding. Therefore, even if there were merit to petitioner's claim of procedural irregularity in the proceedings before the Court of Claims, there was no prejudice to him.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
STEPHEN R. FELSON,
Attorneys.

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